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No. 08-495

In The
Supreme Court of the United States

MANOJ NIJHAWAN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN LAW CAUCUS, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, FLORIDA IMMIGRANT ADVOCACY CENTER, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AND NORTHWEST IMMIGRANT RIGHTS PROJECT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are immigration organizations with expertise on the application of the categorical rule in immigration proceedings. *Amici* have represented or counseled innumerable non-citizens in removal cases before the Board of Immigration Appeals and the federal courts, and in other immigration proceedings. We are concerned that the government's proposal to depart from the categorical rule in immigration proceedings is contrary to statute and would result in immigration adjudicators considering unreliable evidence to determine the immigration consequences of crimes, with unfair and non-uniform results.

Amici consist of the following organizations: the American Civil Liberties Union, American Immigration Lawyers Association, Asian Law Caucus, Florence Immigrant and Refugee Rights Project, Florida Immigrant Advocacy Center, Immigrant Defense Project, National Immigration Law Center, National Immigration Project of the National Lawyers Guild and Northwest Immigrant Rights Project. More

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici* have filed the letters of consent with the Clerk of the Court.

detailed descriptions of *amici* are included in the appendix to this brief.

SUMMARY OF ARGUMENT

The government's proposal that immigration judges engage in open-ended fact-finding to determine the loss amount associated with a prior fraud conviction would mark an abandonment of the categorical approach set forth by the Court in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), and applied to the immigration aggravated felony context in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). The categorical approach, which has a 100-year history in immigration law, requires immigration courts to look only to the elements set forth in the statutory definition of a predicate criminal conviction to determine its immigration consequences. The approach accords with the language of 8 U.S.C. § 1227(a)(2)(A)(iii), which hinges immigration consequences on a non-citizen's prior conviction, and not merely conduct. In this case, the aggravated felony provision at issue, 8 U.S.C. § 1101(a)(43)(M)(i), contains two requirements: (1) that the prior offense involves fraud or deceit; and (2) that the loss to the victim exceeds $10,000. As more fully explained in Petitioner's brief, when the statute of conviction lacks one of these two requirements—namely the requirement that the conviction entailed a loss exceeding $10,000—a categorical match is impossible. *See* Pet. Br. at 42-44.

Even if the Court concludes that immigration court review is not limited to comparison of the statute of conviction against the components of the aggravated felony definition, the Court should reject the government's proposal for open-ended fact-finding in immigration court. As the Second Circuit explained in *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.,* 501 F.3d 116 (2d Cir. 2007), in going beyond a strict element-based approach, *Taylor* and *Shepard* limit immigration court review to certain reliable documents. In the case of a conviction by jury, a subsequent court may review the indictment and jury instructions. *Taylor*, 495 U.S. at 602. When a defendant pled guilty, the subsequent court may consider "the statement of factual basis for the charge, . . . shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard*, 544 U.S. at 20.

The government's suggestion that immigration courts may expand their review beyond the limited set of criminal record documents described in *Taylor* and *Shepard*, *see Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007), raises serious reliability concerns. Those problems are exemplified by the decision below, which approved use of a sentencing stipulation, notes on a judgment of conviction, and a restitution order to prove the loss amount, *Nijhawan v. Mukasey*, 523 F.3d 387, 389 (3d Cir. 2008), when in

fact these records do not reliably show the actual loss amount at all.

Reliance on documents outside those contemplated by *Taylor* and *Shepard* also raises fairness concerns. Nothing in the Immigration and Nationality Act (INA) or the long history of deportation proceedings remotely suggests that immigration judges should conduct mini-trials to determine the amount of loss based on unreliable criminal documents. Such mini-trials would not only be inconsistent with *Taylor* and *Shepard*, but also would be troubling given the lack of evidentiary and procedural protections in immigration courts and in non-adversarial contexts where immigration officers apply the aggravated felony definition. The government's proposal would also result in non-uniform decisions, since immigration courts would rely on criminal records whose contents vary from one criminal jurisdiction to another. In short, abandoning the categorical approach—and particularly construing the statute to permit open-ended fact-finding—would result in a high likelihood that individuals will be removed from the United States when they have not been convicted of the acts that Congress has deemed to be serious enough to warrant deportation.

ARGUMENT

This case turns on the interpretation and application of two immigration statutes. The first, 8 U.S.C. § 1227(a)(2)(A)(iii), provides that "[a]ny alien who is

convicted of an aggravated felony at any time after admission is deportable." The second, 8 U.S.C. § 1101(a)(43)(M)(i), is one of the numerous definitions of "aggravated felony" codified at 8 U.S.C. § 1101(a)(43), and it is the one under which the petitioner, Manoj Nijhawan, was found deportable. Section 1101(a)(43)(M)(i) contains two components, defining the aggravated felony as "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ." Although this Court granted *certiorari* on the relatively narrow question of whether the Third Circuit properly held that the requisite loss amount could be proved by three specific documents from the underlying criminal matter, this case presents a broader question about how immigration adjudicators should determine whether the loss amount requirement of § 1101(a)(43)(M)(i) is satisfied.

Until recently, the Board of Immigration Appeals (BIA) and the federal courts of appeals uniformly applied the "categorical rule" from *Taylor* and *Shepard* to determine whether a non-citizen's prior criminal conviction meets a generic aggravated felony definition under 8 U.S.C. § 1101(a)(43). In *Taylor* and *Shepard*, the Court considered the proper method for courts to determine when a criminal defendant's prior conviction triggers the recidivism-based sentencing enhancement provision in the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The Court held that courts are required to apply "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts

underlying those convictions." *Taylor*, 495 U.S. at 600. This Court has used the *Taylor*/*Shepard* categorical approach for determining whether a noncitizen's prior criminal conviction falls within a statutory ground for deportability. *See Duenas-Alvarez*, 549 U.S. at 185-87; *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004).

Taylor and *Shepard* recognize an exception to the categorical rule, but it is not the open-ended exception the government advocates here, and it does not invite the factual re-litigation that the government now seeks in subsequent immigration proceedings. The *Taylor* Court held that "in a narrow range of cases" where the statute alone does not reveal whether the defendant's prior conviction matches the generic definition triggering the penalty, the sentencing court should look to the indictment and jury instructions to determine whether the "jury was actually required to find all the elements" of the generic offense. *Taylor*, 495 U.S. at 602. When the conviction was not by jury verdict, the court may look only to

> the closest analogs to jury instructions . . . a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases . . . the statement of factual basis for the charge, Fed. Rule Crim. Proc. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.

Shepard, 544 U.S. at 20. The courts of appeals have dubbed this limited inquiry beyond the face of the statute the "modified categorical approach." *Duenas-Alvarez*, 549 U.S. at 187.[2]

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[2] The Court's recent decision in *United States v. Hayes*, No. 07-608, ___ U.S. ___, 2009 WL 436680 (Feb. 24, 2009), does not affect the issue here. *Hayes* concerned 18 U.S.C. § 922(g)(9), which provides that it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. The Court held that "the domestic relationship, although *it must be established beyond a reasonable doubt* in a § 922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense." *Id.* at *3 (emphasis added). *Hayes* so held because the predicate offense was an element of a criminal statute; regardless of whether a jury had to find the domestic relationship element beyond a reasonable doubt in the prior misdemeanor case, the jury in the *new* § 922(g)(9) case was required to find the domestic relationship beyond a reasonable doubt. *See United States v. White*, 328 F.3d 1361, 1367 n.2 (Fed. Cir. 2003) ("this holding [that the categorical approach does not apply] in no way relieves a prosecutor's burden to prove to the jury beyond a reasonable doubt that a criminal defendant had a domestic relationship . . . in order to win a conviction under § 922(g)(9)"). The procedural protection of a second jury is present neither in the *Taylor*/*Shepard* context of a recidivism-based sentencing enhancement nor in the instant immigration context. Indeed, the majority opinion in *Hayes* did not mention *Taylor* and *Shepard* at all, and the *Hayes* rule does not affect the continued force of *Taylor* and *Shepard* in the sentencing and deportation contexts.

In addition, *Hayes* rests upon statutory language that is not present in the statutes at issue here. For example, the statute defining "misdemeanor crime of domestic violence," 18 § 921(a)(33)(A), defines the offense as one that "has as *an element* the use . . . of physical force . . . committed by a current or former spouse . . . ." (emphasis added). *Hayes* focused on

(Continued on following page)

Instead of adhering to the requirements of *Taylor* and *Shepard*, the Third Circuit and BIA have approved broad, open-ended fact-finding by immigration courts to determine the amount of loss in the prior criminal case. *See Babaisakov*, 24 I. & N. Dec. at 313-16, 318; *Nijhawan*, 523 F.3d at 393-94.[3] The BIA has gone so far as to hold explicitly that "an Immigration Judge may consider *any* evidence, otherwise admissible in removal proceedings, including witness testimony." *Babaisakov*, 24 I. & N. Dec. at 321 (emphasis added).

Amici submit that the open-ended fact-finding approach taken by the Third Circuit and the BIA incorrectly abandons the established categorical approach that must apply based on the plain words of the statute at issue. *See infra* Part I.A. For the reasons set forth in Petitioner's brief at 42-44, the most faithful application of the categorical rule is the

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Congress's use of the singular noun "element" to conclude that only the first requirement (use of physical force) must be an element of the predicate offense, while the second requirement (the domestic relationship) need not be. *Hayes*, 2009 WL 436680, at *4.

[3] *See also Conteh v. Gonzales*, 461 F.3d 45, 61-62 (1st Cir. 2006) (engaging in a similar analysis and permitting consideration of a restitution order to determine amount of loss); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008) (holding that any "reasonable, substantial, and probative" evidence, including pre-sentence report, can be examined to determine amount of loss); *Ali v. Mukasey*, 521 F.3d 737, 741-43 (7th Cir. 2008) (adopting *Babaisakov* approach to determine inadmissibility under 8 U.S.C. § 1182(a)(2)(A)).

analysis of the Ninth Circuit in *Kawashima v. Mukasey*, which followed Judge Kozinski's earlier guidance to hold that the loss requirement in § 1101(a)(43)(M)(i) must be an element of the underlying statute of conviction for a prior fraud conviction to constitute an aggravated felony. 530 F.3d 1111, 1117-18 (9th Cir. 2008) (per curiam) (citing *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc)), *pet. for reh'g en banc filed* Sept. 15, 2008. *See also Li v. Ashcroft*, 389 F.3d 892, 899 (9th Cir. 2004) (Kozinski, J., concurring) (noting that *Taylor* plainly forbids resort to review of conviction documents when loss amount is not an element of the statute of conviction).

If the Court permits any deviation from a pure element-based test in this case, the Court should adopt the reasoning of the Second Circuit in *Dulal-Whiteway* to limit the immigration courts' inquiry to reliable documents from the record of conviction as set forth in *Taylor* and *Shepard*. The Second Circuit has observed that the "modified categorical approach" from *Taylor* and *Shepard* has been applied in two circumstances. First, the modified categorical approach has been applied when the statute of conviction contains "alternative means of committing a violation, some of which constitute removable conduct and some of which do not, . . . as discrete alternatives." *Id*. at 127. In such cases, an immigration court may consult the record of conviction only for the limited purpose of determining under which of the "discrete alternatives" the petitioner was convicted.

Second, the modified categorical approach has been applied to statutes, such as the ones under which the petitioner in *Dulal-Whiteway* and Mr. Nijhawan were convicted, that "delineat[e] a single crime that can be committed both by removable and non-removable conduct." *Id.* at 128. Under either version of the modified categorical approach, the immigration court's inquiry is still limited to the documents approved in *Taylor* and *Shepard*.[4] Applying the second version of the modified categorical approach, *Dulal-Whiteway* concluded that restitution orders are not among those documents approved in *Taylor* and *Shepard* as they do not constitute reliable proof of the nature of the criminal conviction. *Id.* at 129-30.[5]

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[4] Two hypothetical statutes can help to illustrate the difference between the two versions of the modified categorical approach. If a state fraud statute punished obtaining property by fraud where either the amount of loss exceeds $10,000 or the victim is over 65 years old, an immigration court would apply the first type of modified categorical approach and examine the record of conviction to decide whether the jury found, or the defendant pled to, the loss element. By contrast, if a state fraud statute punished fraud with a loss exceeding $5,000, or had no loss element at all, an immigration court could apply the second type of modified categorical approach to determine whether the convicting jury found, or the defendant admitted to in his plea allocution or plea agreement, a loss in excess of $10,000.

[5] *See also Obasohan v. U.S. Att'y Gen.*, 479 F.3d 785 (11th Cir. 2007) (applying *Dulal-Whiteway* version of the modified categorical approach to reject the BIA's reliance on restitution order); *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137 (2d Cir. 2008) (following *Dulal-Whiteway* approach in different aggravated felony context).

In either application of the modified categorical approach, the universe of reliable documents is limited, as set forth in *Taylor* and *Shepard*, to those that demonstrate that a jury found, or the defendant admitted to, the required fact in connection with the conviction. *Amici* submit that if the Court declines to adopt the pure element-based approach of the Ninth Circuit in *Kawashima*, the Court should expressly hold that the proof of loss amount under 8 U.S.C. § 1101(a)(43)(M)(i) must be limited to the documents approved by *Taylor* and *Shepard*, as the Second Circuit held in applying the modified categorical approach in *Dulal-Whiteway*.

As explained more fully below, the open-ended fact-finding approach of the Third Circuit and the BIA contravenes the statutory language of 8 U.S.C. §§ 1101(a)(43)(M)(i) and 1227(a)(2)(A)(iii), ignores the reliability concerns underlying *Taylor* and *Shepard*, and is fundamentally incompatible with the deportation system established by Congress and consistently implemented by immigration adjudicators.

I. Consistent with *Taylor* and *Shepard*, the INA Requires an Immigration Judge to Find the Existence of an Aggravated Felony Conviction Based on Reliable Evidence that the Requisite Elements were Admitted by the Defendant in Pleading Guilty or Found Beyond a Reasonable Doubt.

A. Sections 1101(a)(43)(M)(i) and 1227(a)(2)(A)(iii) Premise Aggravated Felony Penalties on the Existence of a Prior Conviction.

The BIA and Third Circuit's open-ended fact-finding approach is inconsistent with the plain language of the INA, which premises aggravated felony consequences on the existence of a prior conviction, and not merely prior conduct. In combination, the statutes governing Mr. Nijhawan's removal provide that an alien who "is convicted of" (8 U.S.C. § 1227(a)(2)(A)(iii)) "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" (8 U.S.C. § 1101(a)(43)(M)(i)) is deportable. The plain and ordinary meaning of this language is that the alien must have been "convicted of" both elements of § 1101(a)(43)(M)(i) to be deportable.

That this was Congress's intent is clear from a comparison of § 1227(a)(2)(A)(iii) with other statutes that hinge deportability not on a prior conviction, but in significant contrast, on simply the commission of some act. The INA contains numerous examples

where mere criminal *conduct* without a conviction constitutes a basis for deportation.[6] When Congress wanted immigration judges to engage in open-ended fact-finding divorced from the requirements of the categorical rule, it knew how to enact such provisions. In contrast, in enacting § 1101(a)(43)(M), Congress chose to base deportability upon a prior criminal *conviction*, and it is to the prior criminal conviction that the immigration judge must look in determining whether the aggravated felony definition applies.

Both the Third Circuit and the BIA have held that the words "in which" in 8 U.S.C. § 1101(a)(43)(M)(i) somehow divorce the loss component of the aggravated felony definition from the fraud component and subject the two components to drastically different treatment. Based on the two words "in which," the Third Circuit concluded that the determination of loss amount need not be tied to the conviction, but is a "qualifying" "fact" that the immigration court need only find to be sufficiently "tethered" to the conviction. *Nijhawan*, 523 F.3d at 394-96. Similarly, based

[6] *See*, *e.g.*, 8 U.S.C. §§ 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."), 1227(a)(3)(D) ("Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter . . . or any Federal or State law is deportable."), 1227(a)(4)(A)(i) ("Any alien who has engaged, is engaged, or at any time after admission engages in . . . any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information . . . is deportable.").

on the thin reed of the "in which" phrase, the BIA created a distinction between "offense-element" facts and "nonelement" facts, and then imposed entirely different approaches to ascertaining the two ostensible types of facts. The Third Circuit and the BIA have pulled the concepts of "tethering," "qualifying fact," "offense-element fact," and "nonelement fact" out of thin air—these terms appear nowhere in the statute or legislative history of the aggravated felony provision.

The Ninth Circuit correctly understood the language of § 1101(a)(43)(M)(i) in adopting the pure elements-based categorical approach for both the fraud and loss components in *Kawashima*. But even if the Court finds that approach inapplicable, there is still no basis for opening the loss determination to full re-litigation in the evidentiary free-for-all that the government proposes. Instead, the Court should adopt the Second Circuit's *Dulal-Whiteway* approach and limit the scope of inquiry on loss amount to the reliable documents specified in *Taylor* and *Shepard*.

B. The Third Circuit and BIA Rulings Ignore the Reliability Concerns Underlying *Taylor* and *Shepard*.

The documents approved in *Taylor* and *Shepard* have one thing in common: they constitute reliable proof of the actual facts established in the prior criminal case. When the conviction is by guilty plea, the documents must establish that the defendant

admitted the facts underlying the conviction in the course of a guilty plea. *See Brady v. United States*, 397 U.S. 742, 748 (1970) ("Central to the [guilty] plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment."); *United States v. O'Donnell*, 539 F.2d 1233, 1236 (9th Cir. 1976) ("pleas of guilty, when made voluntarily and intelligently, are admissions of factual guilt which are so reliable, that the issue of factual guilt is removed from the case") (superseded on other grounds by amendment to Fed. R. Crim. P. 11). When the conviction occurs after a trial, the documents must establish that the jury (or in cases where there is a bench trial, the judge) found the existence of the facts underlying the conviction beyond a reasonable doubt, *see In re Winship*, 397 U.S. 358, 364 (1970).[7] This Court has cautioned that other

[7] In rejecting the *Taylor/Shepard* approach, the Third Circuit posed the hypothetical question, "why the prosecutor would ever ask the jury to find a fact not relevant to the conviction." *Nijhawan*, 523 F.3d at 399 n.11. Apparently, the Third Circuit believed that there was no good answer to that question. But this Court's precedents provide one: prosecutors are *required* to ask a jury to find a fact not relevant to the conviction—*i.e.*, a fact that is not an element of the offense—when that fact is the basis for an increased maximum sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Blakely v. Washington*, 542 U.S. 296, 306-07 (2004). *See also United States v. Booker*, 543 U.S. 220, 231 (2005) (noting that a statute's "characterization of critical facts [as an element of the offense or not] is constitutionally irrelevant" to whether a jury must find them) (citations omitted).

documents from the criminal record—such as police reports or criminal complaint applications that merely set forth unproved allegations—do *not* constitute reliable proof of what actually transpired in the past offense. *Shepard*, 544 U.S. at 16.

The decision below demonstrates precisely why deviation from *Taylor* and *Shepard* leads to unreliable results. The Third Circuit held that the $10,000 loss requirement was met because (1) Mr. Nijhawan "entered into a stipulation for sentencing purposes in which he agreed that, 'because the loss from the offense exceeds $100 million, the offense level [under the U.S. Sentencing Guidelines] is increased 26 levels' "; (2) in entering the judgment of conviction, the trial judge filled in the space for "loss" with the amount $683,632,800.23 along with a notation that the finding of loss was required under the federal criminal code; and (3) Mr. Nijhawan was ordered to pay restitution in the amount of $683,632,800.23. *Nijhawan*, 523 F.3d at 389. None of those documents suffices under *Taylor* and *Shepard*; they do not reliably prove actual loss to the victim.

A "stipulation for sentencing purposes"—unlike an admission made in the course of pleading guilty—does not necessarily reflect the actual facts of the case. Rather, a defendant may acquiesce to a certain loss amount for purposes of obtaining an agreed-upon sentencing range, or for purposes of setting the restitution amount, even if he could not state truthfully under oath that the negotiated loss amount reflects what actually transpired in the course of

committing the offense. The defendant may agree to the government's alleged loss amount because the overall *quid pro quo*, taking all factors into account, is favorable.[8]

The other documents the Third Circuit relied upon—the sentencing court's judgment of conviction and restitution order—are also unreliable evidence of what actually happened in Mr. Nijhawan's past conviction. In setting restitution and making findings for sentencing purposes, a federal district court applies a preponderance of the evidence standard. *See*, *e.g.*, *United States v. Juwa*, 508 F.3d 694, 701 (2d Cir. 2007); *United States v. Ali*, 508 F.3d 136, 143 (3d Cir. 2007). Moreover, in making factual findings for sentencing purposes, a federal district court may rely upon hearsay evidence—and even credit it over sworn testimony. *See* U.S.S.G. § 6A1.3.[9] Indeed, under the

[8] For example, in a fraud case involving numerous transactions, the government may contend that the loss amount for the entire scheme is $25,000, while the defendant honestly contends that some of the transactions were actually legitimate and thus the loss amount is only $5,000. In the course of plea negotiations, the defendant may acquiesce in a compromise loss amount of $15,000, even though he does not agree that some of the included transactions were in fact fraudulent. The defendant may decide that the bargain is worthwhile (*e.g.*, if the government is forgoing other charges), even though the factual assumptions are not accurate, particularly if he fears he will not prevail in a contest over the loss amount in light of the low preponderance of the evidence standard that applies to fact-finding at sentencing.

[9] State restitution orders also permit findings of amount of loss to be based on hearsay evidence, and the amount of loss

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federal sentencing guidelines, the court may hold a defendant accountable for "relevant conduct" including losses associated with counts on which the defendant was not convicted. *See* U.S.S.G. § 1B1.4. Similarly, "judgments of conviction" contain unreliable and unproven factual allegations. *See*, *e.g.*, N.J. R. 3:21-5(b) (judgment of conviction shall contain a "statement of the reasons" for the sentence imposed); *Bibby v. Tard*, 741 F.2d 26, 30-31 (3d Cir. 1984) (in judgment of conviction, trial court erroneously stated that defendant had an armed robbery conviction and that defendant carried a loaded weapon, a fact the state conceded was false).

Thus, under federal sentencing laws, the sentencing court's determination of loss amount as reflected in the judgment of conviction and restitution is far less reliable than the documents this Court held to be permissible in *Taylor* and *Shepard*, and that the Second Circuit accepted as reliable in *Dulal-Whiteway*. *Cf. Blakely*, 542 U.S. 296 at 311-12 (noting unfairness that would result if defendant could be

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similarly need only be shown by a preponderance of the evidence or some lesser standard. *See, e.g.*, *People v. Francis L.M.*, 718 N.Y.S.2d 669 (N.Y. App. Div. 2000) (court was entitled to rely upon hearsay); *Commonwealth v. Casanova*, 843 N.E.2d 699, 755-56 (Mass. App. Ct. 2006) (same); *People v. Tabb*, 88 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2009) ("standard of proof at a restitution hearing is by a preponderance of the evidence"); *State v. Gears*, 733 N.E.2d 683, 686 (Ohio Ct. App. 1999) ("amount of the restitution must be supported by competent, credible evidence from which the court can discern the amount of the restitution to a reasonable degree of certainty").

subjected to large increase in maximum potential sentence "based not on facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a [presentence] report compiled by a probation officer who the judge thinks more likely got it right than got it wrong").[10]

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[10] The Third Circuit opined that applying the modified categorical approach to loss amount would improperly import the beyond-a-reasonable-doubt standard of proof from the criminal case into the immigration context, where a clear-and-convincing standard applies pursuant to 8 U.S.C. § 1229a(c)(3)(A). *Nijhawan*, 523 F.3d at 398. But this confuses the general standard of proof for questions relating to removal with the specific requirement that Congress imposed by basing this particular ground for deportability upon a prior criminal conviction. When Congress has premised deportability upon a *conviction*, as under 8 U.S.C. § 1227(a)(2)(A)(iii), there necessarily must have been a finding beyond a reasonable doubt in the underlying criminal conviction. Indeed, in holding that the categorical approach does apply to the fraud component of the aggravated felony definition, the Third Circuit acknowledges that the fraud element must have been proved beyond a reasonable doubt in the prior criminal proceeding, even though the general standard for removal proceedings is clear and convincing evidence.

There is nothing illogical about the *Dulal-Whiteway* approach because, under that approach, immigration courts rely upon documents showing that the loss component was proved beyond a reasonable doubt in the prior criminal case. That evidence necessarily meets the lower clear-and-convincing evidence standard of 8 U.S.C. § 1229a(c)(3)(A). In contrast, under the Third Circuit's approach, a fact established during sentencing, and thus only by a preponderance of the evidence, would illogically be deemed sufficient to prove the loss amount by the *higher* standard of clear and convincing evidence.

The likelihood of arbitrary or erroneous decisions based on unreliable documents becomes even greater if immigration judges look to state court documents beyond restitution orders, such as presentence reports. The range of information that may be included in such reports is exceedingly broad, *see*, *e.g.*, Cal. R. Ct. 4.411.5 (report should include "[a]ny statement made by the defendant to the probation officer," the victim's statement, "[a]ny relevant facts concerning the defendant's social history," and statements from police, prosecutors, probation officers, and any other "interested persons"); N.Y. Crim. Law § 390.30(1) (presentence reports contain "circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, ... [and] any other matter which the agency conducting the investigation deems relevant"). In some jurisdictions, information is included in a presentence report merely because the investigator deems it "relevant" or "reliable." *See*, *e.g.*, *id.* § 390.30(3)(a); Idaho Crim. R. 32(e).

In short, because the BIA and Third Circuit's approach permits the use of entirely unreliable evidence as to loss amount, there is a great likelihood that non-citizens will be held deportable under 8 U.S.C. § 1101(a)(43)(M)(i) when in fact they have not been convicted of the conduct that Congress has deemed serious enough to warrant removal.

C. The Court Should Not Defer to the BIA's Interpretation of the Statutory Language.

The Court should reject the government's argument that deference to the BIA compels the BIA's open-ended fact-finding approach. No deference to the agency is permitted because the statutory language unambiguously requires a "convict[ion]" for an aggravated felony, and does not permit recourse to non-conviction documents to determine the loss amount. 8 U.S.C. § 1227(a)(2)(A)(iii). *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (deference only applies when statute is ambiguous).

Even if the statute were ambiguous, the BIA's decision is not entitled to deference because 8 U.S.C. § 1101(a)(43)(M) is a criminal statute as well as an immigration statute. In addition to supplying the definition of "aggravated felony" for purposes of the deportability statute, 8 U.S.C. § 1227(a)(2)(A)(iii), § 1101(a)(43)(M) also operates as a criminal statute through 8 U.S.C. § 1326(b)(2), which states that the maximum sentence for the federal crime of illegal reentry into the United States after a prior deportation is increased from 2 years to 20 years for any non-citizen "whose removal was subsequent to a conviction for commission of an aggravated felony." It is well-settled that the BIA has no authority to interpret federal criminal statutes. *Matter of Carachuri-Rosendo*, 24 I. & N. Dec. 382, 385 (BIA 2007). *See generally Gonzales v. Oregon*, 546 U.S. 243, 258

(2006) ("*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress delegated to the official.").

And finally, even if deference to the BIA's view might otherwise be considered, the government's interpretation should be rejected under the rule of lenity. In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court applied the rule of lenity in an analogous circumstance, construing a criminal statute, 18 U.S.C. § 16, which defines "crime of violence" through cross-reference to an immigration statute, 8 U.S.C. § 1101(a)(43)(F). *Id.* at 11 n.8 ("Although we deal here with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and non-criminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). *Cf. United States v. Hayes*, No. 07-608, ___ U.S. ___, 2009 WL 436680, at *13 (Feb. 24, 2009) (Roberts, C.J., and Scalia, J., dissenting) ("textbook case for application of the rule of lenity" exists when "text of [statute] is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much").

II. Immigration Courts Have Limited Their Review to Reliable Conviction Record Documents Through Application of a Categorical Approach for Over a Century.

Even prior to the Supreme Court's decisions in *Taylor* and *Shepard*, immigration courts had been applying a categorical approach (in either its pure element-based or modified forms) to determine the immigration consequences of predicate criminal convictions for more than a century. With prior immigration provisions that premised immigration consequences on the existence of a prior conviction—like the aggravated felony provisions at issue here—immigration adjudicators applied a categorical approach that ensured reliance on only the most reliable criminal court documents. Congress legislated against this history when it created the aggravated felony provisions of the current statute, which also predicate immigration consequences on prior conviction (and not commission) of offenses. *See Hayes*, 2009 WL 436680, at *6 (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006), for proposition that "when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (internal quotation marks omitted); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

A categorical approach that does not permit open-ended fact-finding has a long history in immigration

law, stemming from Congress's continuous use of "convicted" language in the immigration statute since at least 1891. *See* Act of March 3, 1891, 26 Stat. 1084. In a 1914 case, the Second Circuit Court of Appeals issued a landmark decision explaining this approach to assessing an individual's conviction under the Act:

> [T]he immigration officers . . . do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude.

United States ex rel. Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914). This reasoning was further refined by Judge Learned Hand in a series of decisions in the 1930s. *See*, *e.g.*, *United States ex rel. Guarino v. Uhl,* 107 F.2d 399, 400 (2d Cir. 1939); *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931). Other federal courts and the immigration agency agreed with this interpretation of the statute in dozens of decisions over the next several decades.[11]

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[11] *See, e.g.*, *Okabe v. INS*, 671 F.2d 863, 865 (5th Cir. 1982); *Aguilera-Enriquez v. INS*, 516 F.2d 565, 570 (6th Cir. 1975); *United States ex rel. Giglio v. Neelly*, 208 F.2d 337, 342 (7th Cir. 1953); *United States ex rel. McKenzie v. Savoretti*, 200 F.2d 546, 548 (5th Cir. 1952); *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929); *Matter of B-*, 1 I. & N. Dec. 52, 57-58 (AG 1941); *Op. of Hon. Cummings*, 39 Op. Att'y Gen. 215 (AG 1938); *Op. of Hon. Cummings*, 39 Op. Att'y Gen. 95 (AG 1937); *Op. of Hon. Cummings*, 37 Op. Att'y Gen. 293 (AG 1933); *Matter of V-D-B-*, 8 I. & N. Dec. 608, 610 (BIA 1960); *Matter of F-*, 8 I. & N. Dec. 469, 472 (BIA 1959); *Matter of H-*, 7 I. & N. Dec. 616, 618 (BIA 1957); *Matter of B-*, 5 I. & N. Dec. 538, 540 (BIA 1953); *Matter of R-*, 4 I.

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These early cases demonstrate the BIA's longstanding concern that deportability determinations be based only on reliable evidence of the prior conviction, such as the plea and indictment. *See, e.g., Matter of B-*, 5 I. & N. Dec. 538, 540 (BIA 1953); *Matter of M-*, 2 I. & N. Dec. 525, 526 (BIA 1946); *Matter of B-*, 1 I. & N. Dec. 52, 57-58 (AG 1941).

The government's proposal to allow immigration courts to consider unreliable evidence of prior convictions runs contrary to this long immigration history, a history of which Congress presumably was aware when it enacted the aggravated felony provision at issue in this case. Indeed, nothing in the statute or its legislative history reflects a desire by Congress to have immigration judges abandon a categorical approach.[12]

& N. Dec. 176, 179 (BIA 1950); *Matter of T-*, 3 I. & N. Dec. 641, 642-43 (BIA 1949); *Matter of M-*, 2 I. & N. Dec. 525, 526 (BIA 1946); *Matter of W-*, 1 I. & N. Dec. 485, 485-86 (BIA 1943).

[12] Congress has amended the aggravated felony provisions at least four times without changing the requirement that the non-citizen be convicted of the predicate offense. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (2003); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-627 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78 (1996); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320-22 (1994); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990). In fact, Congress has considered and rejected deviation from the categorical approach. *See* Border Enforcement, Employment Verification, and Illegal Immigration Control Act, 110th Congress, 1st

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To the contrary, in its most recent comprehensive revision of the immigration statute in 1996, which included an amendment to the aggravated felony provision at issue here, Congress indicated its intent that removal proceedings be conducted in the same manner that they had been previously. *See* H.R. Rep. No. 104-828, at 211 (1996) (Conf. Rep.) ("the removal proceeding under [the new] section[s] shall be conducted by an immigration judge in largely the same manner as [already] provided in sections [governing deportation proceedings]").

III. Under the Third Circuit and BIA's Approach, Immigration Adjudicators Would Be Required to Conduct Mini-trials as to Amount of Loss, with Unfair and Non-Uniform Results.

Under the government's position, immigration courts would be faced with many of the practical and fairness problems that the Court took pains to avoid in *Taylor* and *Shepard*, and that the Second Circuit recognized in *Dulal-Whiteway*. *Cf. Hayes*, 2009 WL 436680, at *13 (Roberts, C.J., and Scalia, J.,

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Session, H.R. 4065 (2007) (proposing failed amendment to INA defining aggravated felonies as offenses "described in [the INA] even if the statute setting forth the offense of conviction sets forth other offenses not described in this paragraph, unless the alien affirmatively shows . . . that the particular facts underlying the offense do not satisfy the generic definition of that offense").

dissenting) ("As we warned in *Taylor* and reaffirmed in *Shepard*, 'the practical difficulties and potential unfairness of a factual approach are daunting.'") (citations omitted). These include the inability of criminal records to adequately convey what a jury was actually required to find, variations among cases and records, and the inability of defendants to rely on issues already adjudicated during the trial. *See Taylor*, 495 U.S. at 601-02. Consideration of such fairness concerns is consistent with Due Process protections that govern removal proceedings. *See generally Landon v. Plasencia*, 459 U.S. 21 (1982).

A. Mini-trials as to Amount of Loss are Inconsistent with the Limited Evidentiary and Procedural Protections Available in Removal Proceedings.

This Court's concerns about the procedural unfairness inherent in a factual inquiry, as expressed in *Taylor* and *Shepard*, apply with even greater force in the immigration courts. These administrative tribunals are ill-suited to conduct the fact-intensive inquiries envisioned by the government because of the structure of removal proceedings, which are not governed by formal rules of evidence and lack basic procedural protections.

Immigration courts are not governed by formal rules of evidence. The courts of appeals have upheld, for example, the admission of poorly authenticated and hearsay evidence. *See, e.g., Duad v. Holder*, ___ F.3d

___, 2009 WL 331289, at *3-4 (7th Cir. Feb. 12, 2009); *Solis v. Mukasey*, 515 F.3d 832, 835-36 (8th Cir. 2008); *Vatyan v. Mukasey*, 508 F.3d 1179, 1185 (9th Cir. 2007); *Yongo v. INS*, 355 F.3d 27, 30-31 (1st Cir. 2004). In the mini-trials required by the government's approach, this lax evidentiary standard could lead to unfair results. If, as envisioned by the government's position, a non-citizen who pleads guilty to a fraud offense faced a subsequent mini-trial as to the amount of loss, an immigration judge could reach conclusions inconsistent with the original criminal proceeding, based on the application of less rigorous evidentiary standards.

The mini-trials created by the government's approach would result in further unfairness because most constitutional and procedural protections present in the criminal context do not apply with full force in removal proceedings. Non-citizens have neither appointed counsel, *see* 8 U.S.C. § 1229a(b)(4)(A), nor a right to a jury trial. The Fourth Amendment exclusionary rule and Fifth Amendment privilege against self-incrimination also do not apply with full force. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984) (exclusionary rule does not apply unless egregious violation). *Cf. United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54 (1923) (permitting adverse inference from non-citizen's silence).

Although the INA permits limited discovery and subpoenas in immigration court, 8 U.S.C. § 1229a(b)(1), immigration judges typically grant very little discovery and rarely exercise subpoena power.

See C. Gordon et al., *Immigration Law & Procedure* § 3.07 (2008) (noting "traditional reluctance to permit discovery"). Indeed, most non-citizens are able to obtain basic information, namely the government's file about them, only by resorting to requests under the Freedom of Information Act, which usually entail significant delays. *See* 8 C.F.R. § 103.10; Department of Homeland Security, 2008 Annual Freedom of Information Act Report to the Attorney General of the United States 12, 20 (2008), *available at* http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2008.pdf (median of 238 days for USCIS processing of perfected FOIA requests; 67,545 backlogged FOIA requests for fiscal year 2008). Non-citizens do not have a right to obtain exculpatory evidence in their removal proceedings, including evidence as to amount of loss (if that determination is to be made, as the government suggests, as part of a factual determination). And the Court has observed that "[t]he Courts of Appeals have held . . . that the absence of Miranda warnings does not render an otherwise voluntary statement by the respondent inadmissible in a deportation case." *Lopez-Mendoza*, 468 U.S. at 1039.

Given the procedural and evidentiary limitations of removal proceedings, the government's proposal that immigration judges conduct factual inquiries to determine the amount of loss would lead to unfair adjudications.

B. Mini-trials as to Amount of Loss are Particularly Impracticable and Unfair Given the Realities of Current Removal Proceedings.

In addition to the structural deficiencies of immigration courts, immigration judges are often required to make aggravated felony determinations based on old convictions where evidence as to loss amount would be stale or no longer available. *See* 8 U.S.C. § 1101(a)(43) (the term aggravated felony "applies regardless of whether the conviction was entered before, on, or after September 30, 1996."). *See also Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (DHS brought aggravated felony charges against lawful permanent resident over 13 years after conviction); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (DHS initiated removal proceedings nearly 19 years after guilty plea). Under the government's position, immigration judges would be required to conduct mini-trials to determine amount of loss after criminal records have been destroyed or witnesses' memories have faded.

These concerns are compounded for the tens of thousands of non-citizens in removal proceedings who are detained or lack counsel. Between October 2006 and September 2007, "approximately 84% of detained [non-citizens] with completed immigration court proceedings lacked representation." *See* Vera Institute of Justice, Improving Efficiency and Promoting Justice in the Immigration System 1 (2008), *available at* http://www.vera.org/publication_pdf/477_877.pdf; *see*

also Executive Office for Immigration Review, FY 2007 Statistical Year Book O1 (2008), *available at* www.usdoj.gov/eoir/statspub/fy07syb.pdf (non-citizens were detained in 115,017 proceedings completed in 2007). Non-citizen detainees may be unable to locate old criminal records, particularly given DHS's practice of transferring detained non-citizens to remote facilities thousands of miles from their homes and prior criminal court records. *See Immigration Transfers Add to System's Problems, All Things Considered* (National Public Radio broadcast Feb. 11, 2009); *Sasso v. Milhollan*, 735 F. Supp. 1045 (S.D. Fla. 1990) (non-citizen transferred to El Paso detention facility even though witnesses and evidence in his case located in Florida). DHS may initiate removal proceedings anywhere in the country, 8 C.F.R. § 1003.14, regardless of where a non-citizen resides, and the court may only transfer venue if the non-citizen demonstrates good cause (a standard that in practice is difficult for non-citizens to meet). *See* 8 C.F.R. § 1003.20(b).

Finally, the government's open-ended fact-finding approach for determining who falls within the aggravated felony statute ignores the severe consequences associated with the aggravated felony provisions. The INA subjects non-citizens with aggravated felony convictions to mandatory detention pending proceedings and bars these individuals from almost every form of relief from removal, including asylum. *See* 8 U.S.C. § 1158(b)(2)(B)(i) (asylum bar); 8 U.S.C. § 1226(c) (mandatory detention); 8 U.S.C. § 1229b(a) (cancellation of removal bar); 8 U.S.C. § 1229c(a)(1)

(voluntary departure bar). The government's mini-trial proposal disregards Congress's design for the civil removal process, in which immigration judges rely upon the rigor of prior criminal court proceedings before convictions can serve as the basis for a finding of deportability and its attendant harsh consequences.

C. The Pure Categorical Rule and the *Dulal-Whiteway* Approach Promote Uniformity in Immigration Removal Proceedings Across the Country.

In addition to promoting fairness in removal proceedings, the pure categorical and *Dulal-Whiteway* approaches comport with the immigration uniformity principle of the Constitution, which directs Congress to "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. Uniformity concerns have motivated the application of the categorical approach in the immigration context for nearly a century. *See, e.g., Mylius*, 210 F. 860 at 863. The Court has given weight to uniformity concerns when interpreting the aggravated felony provisions of the immigration statute. *See Lopez v. Gonzales*, 549 U.S. 47, 59 (2006) (finding "no hint in the statute's text that Congress was courting . . . state-by-state disparity" in application of drug trafficking aggravated felony provisions).

If, as the government suggests, immigration courts engaged in broad fact-finding, the sheer variety of differing state practices with respect to the

contents of criminal records would create unfair variation amongst immigration courts. State laws governing restitution orders, for example, vary regarding many factors, including: (1) the type and amount of proof required;[13] (2) the relevance of the defendant's ability to pay;[14] (3) inclusion of actual versus future losses;[15] and (4) whether restitution may be imposed for acts for which the defendant was not convicted.[16] State restitution orders are thus not

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[13] C*ompare*, *e.g.*, *People v. Gemelli*, 74 Cal. Rptr. 3d 901, 903-04 (Cal. Ct. App. 2008) (under California statute permitting loss to be established based on "amount of loss claimed by the victim . . . or any other showing," bare statement of victim in probation report sufficient to support amount of restitution order) *with People v. Wilson*, ___ N.Y.S.2d ___, 2009 WL 396458, *1 (N.Y. App. Div. Feb. 19, 2009) ("unsubstantiated testimony of victim" was insufficient to establish amount of loss in restitution order).

[14] C*ompare*, *e.g.*, *People v. Draut*, 86 Cal. Rptr. 2d 469, 472 (Cal. Ct. App. 1999) (under Cal. Penal Code § 1202.4(g), a defendant's "inability to pay" is not a basis for reducing amount of a restitution order) *with State v. Keener*, 755 N.W.2d 462, 471 (N.D. 2008) (under N.D. Cent. Code § 12.1-32-08(1), court must take into account defendant's ability to pay in determining amount of restitution).

[15] *Compare*, *e.g.*, *Carswell v. State*, 721 N.E.2d 1255, 1259 (Ind. Ct. App. 1999) ("the trial court may consider only those expenses incurred by the victim prior to the date of sentencing in formulating its restitution order" and therefore future counseling expenses could not be included) *with State v. Grindheim*, 101 P.3d 267, 277 (Mont. 2004) (court could impose restitution for victim's future counseling needs).

[16] *Compare*, *e.g.*, *State v. Kelly*, 458 N.W.2d 255, 256 (Neb. 1990) (restricting restitution order to loss caused by passing of fraudulent check for which defendant was convicted) *with People v. Bixman*, 433 N.W.2d 417, 418 (Mich. Ct. App. 1988)

(Continued on following page)

simply a direct reflection of loss to the victim. Rather, the relationship to the victim's loss varies by state, and the court may impose an amount of restitution that bears no relation to actual loss. Immigration courts are ill-equipped to decipher the variations in state restitution orders and other criminal records that vary by state and county, particularly given their caseload.[17]

D. Under the Government's Approach, Non-Judicial Immigration Officers Who Make Aggravated Felony Determinations Through Non-Adversarial, Document-Based Processes Could Engage in Open-Ended Fact-Finding.

The fairness problems associated with adopting the government's free-for-all factual inquiry to determine whether a predicate conviction constitutes an

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(upholding restitution order based on losses caused by fraudulent checks for which defendant was not convicted, but which served as part of course of conduct giving rise to conviction).

[17] In fiscal year 2006, approximately 210 immigration judges handled 365,851 matters. Office of Planning, Analysis, & Technology, U.S. Department of Justice, FY 2006 Statistical Year Book B5 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. *See also* U.S. Government Accountability Office, Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement 12-13 (2006), *available at* http://www.gao.gov/new.items/d06771.pdf (from fiscal year 2000 to fiscal year 2005, number of immigration judges increased by 3% while caseload climbed by 39% and average annual number of cases per judge rose 35% from 1,852 to 2,505).

aggravated felony are compounded when agency officers other than immigration judges make such determinations outside of an adjudicative hearing process. Front-line DHS officers are increasingly responsible for making immigration decisions relating to deportability or other immigration consequences of past criminal convictions,[18] including decisions as to whether a past conviction constitutes an aggravated felony. These decisions typically occur largely based on a paper record, without an adversarial hearing before an independent adjudicator, and sometimes in the absence of the non-citizen.

For example, DHS officers may place non-citizens who they believe are deportable due to "conviction[s] of an aggravated felony" into expedited administrative removal proceedings under 8 U.S.C. § 1228(b). Over half of all removal orders under the aggravated felony provisions are now entered under this expedited administrative removal process.[19] The expedited removal process "expressly exclude[s] the involvement

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[18] *See generally* ABA, American Justice Through Immigrant Eyes (2004), *available at* http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeyes.pdf.

[19] Transactional Records Access Clearinghouse, New Data on the Processing of Aggravated Felons—Administrative versus Immigration Court Orders (2007), *available at* http://trac.syr.edu/immigration/reports/175/ (reporting that, in Fiscal Year 2006, 55% of all removal orders under aggravated felony provisions were administrative orders issued by employees of Immigration and Customs Enforcement in the Department of Homeland Security).

of an impartial adjudicator" and provides "only a paper adjudication" during which "[a] subject need not even be provided with a copy of the evidence on which the charges are based, and the failure to respond on time automatically results in a final deportation order whether or not the allegations are true."[20] Under the government's position, immigration officers placing non-citizens into expedited removal proceedings would arguably be permitted to conduct fact-finding as to prior criminal convictions, without the benefit of an adversarial process or even the presence of the non-citizen, much less the limited process of an immigration court hearing.

Other front-line immigration officers, including detention officers, asylum officers, naturalization officers, border patrol agents, and customs officials, routinely make aggravated felony determinations under the INA. For example, naturalization officers must determine whether a fraud conviction is an aggravated felony because an aggravated felony conviction is a bar to naturalization. 8 U.S.C. §§ 1101(f)(8), 1427(a)(3). *See also* 8 C.F.R. § 316.10(b)(1)(ii) (applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after Nov. 29, 1990). These officers make thousands of naturalization eligibility determinations per year, typically based on a paper record and a non-adversarial interview.

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[20] ABA, American Justice Through Immigrant Eyes, *supra* note 18, at 7, 17-18.

See 8 C.F.R. § 335.3; Office of Immigration Statistics, U.S. Department of Homeland Security, 2007 Year Book of Immigration Statistics 52 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf (1,383,275 petitions for naturalization filed in 2007).

Other low-level immigration officials who make aggravated felony determinations include asylum officers (because an aggravated felony conviction is a bar to asylum under 8 U.S.C. § 1158(b)(2)(B)(i)), detention officers (because an aggravated felony conviction triggers mandatory detention under 8 U.S.C. § 1226(c)(1)(B)), and immigration officers adjudicating other claims for relief (because relief such as self-petitioning under the Violence Against Women Act under 8 U.S.C. § 1154(a)(1)(C) also incorporates the aggravated felony conviction bar through its good moral character requirement, subject to a narrow waiver). *See also* Center for Battered Women's Legal Services, The Role of the Categorical Approach in Assisting Victims of Domestic Violence and Other Crimes (Feb. 25, 2009), *available at* www.immigrantdefenseproject.org/docs/09_CenterBatteredWomen'sLegalServicesPolicyBrief.pdf. The fairness problems enumerated in *Taylor*, including the inability of criminal records to convey adequately what a jury was actually required to find, variations among cases and records, and the inability of defendants to rely on issues already adjudicated during criminal proceedings, *see Taylor*, 495 U.S. at 601-02, are exacerbated in these non-adversarial contexts.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision from the United States Court of Appeals for the Third Circuit be reversed.

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Respectfully submitted,

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DESCRIPTION OF AMICI

The **American Civil Liberties Union (ACLU)** is a non-profit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation's civil rights laws. The Immigrants' Rights Project of the ACLU conducts a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of non-citizens.

The **American Immigration Lawyers Association (AILA)** is a national association with approximately 10,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States district courts, courts of appeal, and the Supreme Court of the United States.

The **Asian Law Caucus** promotes, advances, and represents the legal and civil rights of the Asian

and Pacific Islander communities. The Immigrant's Rights Project at the Asian Law Caucus provides direct representation to individuals facing detention and deportation before immigration courts, the Board of Immigration appeals (BIA) and the Ninth Circuit Court of Appeals.

The **Florence Immigrant and Refugee Rights Project (FIRRP)** provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement (ICE). Through its Know-Your-Rights presentations, workshops, legal representation and targeted services, FIRRP regularly identifies persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of Immigration Appeals, and the circuit courts of appeal.

The **Florida Immigrant Advocacy Center (FIAC)**, a non-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy and education. For more than a decade, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit.

The **Immigrant Defense Project (IDP)** is a not-for-profit legal resource and training center

dedicated to advancing the legal rights of immigrants. A national expert on the intersection of criminal and immigration law, IDP trains and advises both criminal justice and immigrant advocates on issues that involve the immigration consequences of criminal convictions. IDP seeks to improve the quality of justice for non-citizens accused of criminal conduct and therefore has a keen interest in the fair and just administration of the nation's immigration laws.

The **National Immigration Law Center (NILC)** is a non-profit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members, by engaging in policy advocacy and litigation, and providing support to a wide range of organizations and advocates across the country. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process, and NILC has a direct interest in the issues in this case.

The **National Immigration Project of the National Lawyers Guild (National Immigration Project)** is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project

has participated as *amicus curiae* in several significant immigration-related cases before this Court.

The **Northwest Immigrant Rights Project (NWIRP)** is a non-profit legal organization dedicated to the defense and advancement of the rights of non-citizens in the United States. NWIRP provides direct representation to low-income immigrants who are placed in removal proceedings.